IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

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ORDER

Jitendra Singh Rawat
vs
State of Rajasthan & Ors.

S.B. CIVL WRIT PETIITON NO.683/2000 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER : 17th August, 2006

PRESENT
HON'BLE MR.MOHAMMAD RAFIQ,J.

REPORTABLE

Mr.Harish Purohit, Advocate, for the petitioner.
Mr.Rameshwar Dave, Dy. Government Advocate for the respondents.
Mr. D.C. Sharma, Advocate, for the respondents.

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BY THE COURT: -

The present writ petition has been filed by the petitioner Jitendra Singh Rawat with the prayer that the respondents be directed to give him appointment on the post of Instructor, Physical Education, according to his placement in the merit list and in the alternative, it has also been prayed that the respondents may be directed to fill in 6th vacancy at Roster Point No.29 pertaining to the other backward Classes (in short

OBC) for the purpose of appointment on the post of Instructor, Physical Education thereby appointing him on the said post.

The case of the petitioner in nut shell is that the respondents by an advertisement invited applications from eligible candidates for appointment on the post of Instructor, Physical Education in District Rajsamand against the vacancies of the year 1989-99. Last date for submitting the applications forms was 15th Sept., 1998 and on the same day, the respondents held the selection proceedings and prepared a merit list. This merit list was consisting of 20 persons in General Category and 20 persons in OBC category, besides the candidates belonging to Scheduled Castes and Scheduled Tribes categories. The petitioner alleged that last person in the category of general candidates was having 89.37% marks and the petitioner who was at S.No.6 in the category of OBC was having 91.22% marks and hence, the petitioner was entitled to be placed in General Category at S.No.6. However, his name was not shown in General Category because the respondents prepared a separate list for OBC

category, . It has also been alleged that the respondent no.3 issued various appointment orders for the period commencing from 10.3.1999 to 24.3.1999 and during this period, appointments were given to 30 male candidates and 5 female candidates. Last candidate among them had 90.18% marks. Accordingly, the petitioner's right to consideration for appointment has been defeated inasmuch as the respondents have mis-applied the policy of reservation thereby violating the right to equality enshrined in Article 14 and 16 of the Constitution of India. It has also been alternatively argued that the respondents have filled in 30 vacancies. Six posts out of these 30 were required to be filled in from the candidates of OBC category as per their quota of reservation whereas the respondents have filled in only five vacancies.

Learned counsel for the petitioner in support of his arguments relied upon various judgments of Hon'ble Supreme Court in (1) Indra Sawhney Vs. Union of India reported in AIR 1993 SC 477 (2) Yoganand Vishwarao Patil Vs. State of Maharashtra & Ors reported in (2005) 12 SCC 311 (3) R.K. Sabharwal VS. State of Punjab reported in (1995) 2

SCC 745 and (4) Ritesh R.Sah Vs. Dr. Y.L. Yamul & Ors, reported in AIR 1996 SC 1378. Learned counsel for the petitioner cited above referred judgments on the proposition of law that even if a candidate belonging to reserved category has been able to secure a place in merit of general category, in other words, has secured more marks than the marks of the last candidate in general category, he cannot be considered for appointment against the reserved category and accordingly, his appointment should be made against the post meant for general category.

On the other hand, the respondents have in their reply stated that they have prepared separate merit lists of general category, OBC, S.C. and S.T. Categories. Appointments were given to the selected candidates according to the procedure of roster point. It has been stated that since the petitioner has applied for the post as an OBC candidate therefore, his candidature was considered according to such selection procedure at roster point of OBC candidate. Since only five persons of OBC were appointed and petitioner's name was placed at

S.No.7 in their merit, he could not be appointed. The petitioner at this stage cannot claim selection in general category because he had applied as a candidate of OBC and not as a candidate of general category.

I have given bestowed my earnest consideration to the arguments advanced by learned counsel for the parties, cited case law and perused the record.

The controversy raised in this case has been settled by the Constitution Bench of the Hon'ble Supreme Court in Indra Sawhney (supra). In para no. 811 of the said judgment, their Lordships held as under : -

> "In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

The Apex Court following the ratio of Indra Sawhney reiterated the same law in para no.4 of its judgment in R.K. Sabharwal (supra) in the following terms: -

> "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserved categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can complete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State if not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise make the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be

> varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition."

This very view has been later reiterated again by their Lordships of the Hon'ble Supreme Court in Ritesh R. Sah, in para no. 17 of the judgment while observing as under: -

> "In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of

> such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have bee kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as a open category candidate and not as a reserved category candidate."

In a recent judgment delivered in Yoganand Vishwasrao Patil (supra) again the Hon'ble Supreme Court reiterated the very same position of law in following words: -

> "8.The legal position has been clarified in Ritesh R.Sah that a student, who is entitled to be admitted on the basis of merit, though belonging to reserved category, cannot be considered to be admitted in seats reserved for reserved category but, at the same time, provision should be made that it will not work out tot he disadvantage of such candidate and he may not be placed at a more

> disadvantageous position than the less meritorious reserved category candidate. It was further held that while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate. In fairness to the respondent State, it is not being contended before us that because the rule has not been framed, the State government is not required to implement the judgment in Ritesh R.Sah in letter and spirit. In fact, in purported implementation of the decision of this Court, the Director of Medical Education and Research, Mumbai, by communication dated 31.3.2005 sent to its learned advocate i.e. Standing Counsel, has stated that the directions of this Court are being complied with in letter and spirit by the competent authority while making admission to the postgraduate courses."

Examined in the light of the settled proposition of law as discussed above, it would be evident that the respondents in the present case have mis-applied the policy of reservation. This would be evident from a bare perusal of their reply that the respondents have prepared separate merit lists for each, general category, OBC SC and ST and have completely excluded the candidates belonging to OBC against the vacancies meant for

general quota just because the OBC candidates in their application forms requiring them to fill up their category in the relevant column described themselves as belonging to OBC category. Such a procedure negates their right to consideration in keeping with the spirit of Articles 14 and 16 of the Constitution of India. In giving effect to the policy of reservation, the respondents have to broadly divide the seats only in two categories, one unreserved category and another reserved category. Reserved category can further be sub-divided into categories of general, OBC, SC and ST. They should first initiate the process of making appointment against the posts of un-reserved category. In doing so, they have to consider all candidates irrespective of their category based on reservation whether OBC SC or ST. Having filled up all unreserved post, they can proceed to make appointment against the post of reserved category in the order of merit from amongst the candidates available at that stage.

The respondents were required to appoint the petitioner against the post meant for unreserved category on the basis of his own merit by applying

the above principles of law. As held by their Lordships of the Hon'ble Supreme Court in Indra Sawhney (supra) "reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates." The Hon'ble Supreme Court in the case of R.K. Sabharwal (supra) reiterated the same proposition of law when their Lordships held that "the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation."

The very same principle was reiterated in the case of Ritesh R.Sah in which their Lordships held that "that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved

category."

An analysis of the law referred to above would show the underling philosophy of reservation made in favour of SC and ST with reference to Article 15(4) and 16(4) of the Constitution of India. These provisions confer certain benefits on the persons belonging to these categories which are not in substitution of any other right, which may be otherwise available to them as citizens of country. Benefit of reservation does not substitute or supplant any other right of a person belonging to SC or ST. Such benefit would be in addition to an already existing right including the fundamental right of equality. If any scheme of reservation or the procedure evolved with a view to giving effect to such scheme, is made to depend upon the condition of truncating the fundamental or any other right of an individual, such scheme of reservation would be contrary to the constitutional provisions and the law, to the extent it curtails fundamental right or any other right of a person belonging to such category. Reserving certain posts or seats for

different groups of the community in the first instance means that these posts and/or seats are meant for members belonging to such specified group. This is an additional benefit conferred on them. On account of such additional benefit however they are not precluded from claiming ordinary benefits otherwise available to them. Members belonging to SC and ST for whom reservation of posts is made are not reserved for these posts although its converse is true. They cannot be asked to occupy only reserved posts. They would be free to occupy any posts including unserved posts. However, the requirement of law is that while claiming appointment against unserved posts/seats, they should prove their merit like any other citizen, who is not entitled to the benefit of reservation. No provision of law whether substantive or procedural, can be interpreted so as to run country to this basic tenet of the Constitution of India.

In the result, action of the respondents in not considering his candidature for appointment against the post of general category is declared illegal and unconstitutional. The writ petition

is therefore allowed. The respondents are directed to consider the case of the petitioner for appointment by placing him appropriately in the merit list of the general candidates immediately above the candidate, who secured lesser marks than him and if found suitable, appoint him on the post of Instructor, Physical Education with effect from the date on which such candidate was appointed. The petitioner shall however not be entitled to any monetary benefits for the intervening period for the reason that he has not actually served the respondents during such period. His salary shall be arrived at notionally as if he was appointed on the date on which the candidates shown immediately below him in the merit was appointed. He shall however be entitled to seniority from the said date and consequential benefits of promotion and revision of pay scale etc. Compliance of this judgment should be made within a period of three months from the date of service a copy of this order.

There shall be no order as to costs.

(MOHAMMAD RAFIQ),J.

c.p.goyal/-